

REMARKS/ARGUMENTS

The undersigned greatly appreciates the courtesies extended by Examiner Jean Janvier during the personal interview with the applicant, Mr. Rich Ekstrom, at the United States Patent and Trademark Office on April 18, 2006. A proposed amendment to the claims was presented to the examiner for discussion during the interview. In addition, Applicant provided a brief presentation which outlined various distinguishing features of the present system verses existing and prior practices in the health club industry.

Claims 1-22 in the case are pending, and stand rejected under 35 U.S.C. §103(a) as being unpatentable over Deaton ('302).

As discussed during the interview, the claims are amended herein to further distinguish the present system and method from the art cited. Specifically, amended base Claims 1, 12, 21, and 22 recite:

(i) a system (and method) for retaining fee-based memberships at a health club providing health club services to its members;

(ii) the members being categorized in a number of member segments based on level of attendance; the member segments comprising non-user members, low user members, regular user members, and new members; and the new members being categorized as such for a predetermined initiation period prescribed by the health club; and

(iii) sending text messages which are customized for each of the different member segments.

The prior patent to Deaton relates to the retail grocery industry, and does not address the issue of membership retention in a fee-based service industry. Deaton does not teach or suggest categorizing store patrons in each of the four member segments recited in the amended claims —i.e., non-user members, low user members, regular user members, and new members. Finally, Deaton does not teach or suggest communicating

different text messages to members based on how the member has been categorized. Each of these points is discussed further below.

I. Customer verses fee-based membership

A fundamental difference exists between *customers* in a retail industry and *members* in a fee-based membership industry. For example, a customer generally has complete freedom to purchase product (or not) at each purchasing event and at any particular retail store without penalty or added cost to customer. This freedom comes with no sense of obligation or commitment to any one particular store. Most often, the customer will select a retail store based on factors such as convenience and purchase prices. On the other hand, a *fee-based member* in a service industry has an ongoing transactional and financial *commitment* to a particular facility regardless of whether the member is utilizing the service (i.e., visiting the place of business). If the member chooses to utilize services of another unrelated facility, he or she does so at an increased cost—double payment of membership or usage fees. As such, because of this commitment to a specific health club, the member's *loyalty* to one club verses another is essentially a non-issue. In the retail grocery industry, no such financial commitment exists and loyalty, unlike membership retention, is a key issue.

Existing legislation recognizes this meaningful difference between an individual who is a customer, potential customer, or potential member and one who has a "fee-based membership." For example, according to the "No Call List" (mentioned previously by the examiner) businesses cannot call potential customers, potential members, or customers without prior documented consent. However, fee-based membership businesses are not bound by these same restrictions because the government recognizes that the member

has an ongoing transactional relationship with that business.
(<http://www.fcc.gov/cgb/policy/02-278finalrules.pdf>).

Additionally, according to the CAN SPAM Act, businesses have a variety of restrictions in their email correspondence to customers, potential customers and potential members and must include an "opt-out" option. On the other hand, businesses are free to communicate with their fee-based members without these same restrictions. <http://www.ftc.gov/bcp/online/pubs/buspubs/canspam.htm> ("A 'transactional or relationship message' — email that facilitates an agreed-upon transaction or updates a customer in an existing business relationship is exempt from most provisions of the CAN-SPAM Act.").

In view of the above, Applicant respectfully submits that a meaningful and substantial difference exists between *customers* in a retail industry, as discussed in Deaton, and *members* of a fee-based services industry.

II. Non-user members, low user members, regular user members, and new members

As previously stated, Deaton does not teach or suggest categorizing store patrons in each of the four member segments recited in the amended claims —i.e., non-user members, low user members, regular user members, and new members. Indeed, if the "members" of the claimed invention equate to *customers* in Deaton (as suggested by the examiner) **then there could not be a "non-user member" segment in Deaton.** In other words, to be an actual customer in Deaton you must presumably use the grocery store. Likewise, Deaton provides no incentive or motivation to segment a retail store customer base into a *new members* category; wherein the new member would remain categorized as such for a predetermined time period. This category is meaningful in the present system and method since it allows the health club to readily identify the new users of the

facility, and perhaps offer special training services to be certain that the new member is becoming more comfortable over a period of time with his or her workout routine and the various pieces of equipment available. In the retail grocery industry discussed in Deaton, new customers are not provided with (nor do they need) an "orientation period" within which to get comfortable with the store.

Accordingly, Deaton does not teach or suggest the concept of segmenting a membership base into non-user members, low user members, regular user members, and new members.

III. Targeted communications

The examiner states that "the content of the electronic messages ... is a matter of desires. In fact, two or more companies or health club facilities, implementing the present claimed system, may choose different text messages or marketing literature to achieve the same objective – retaining and increasing membership." Applicant respectfully disagrees.

As indicated in the amended claims, communications to each of the different member segments includes a strategic component unique to the particular level of attendance. For example, for non-user members, the communication may include a text message asking the member to identify obstacles preventing more frequent usage of the health club. This message lets the member know that the club cares about its attendance, and provides the member with a sense of accountability (unlike the *anonymity* generally felt by customers at a retail grocery store). For low user members, the communication may include a text message including an exercise motivation tip. Again, this message promotes accountability and attempts to motivate the member to increase his or her attendance. For regular user members, the communication may include a text message providing a

wellness tip. For new members, the communication may include a text message welcoming the new member to the health club and/or offering a health club orientation.

Prior to Applicant's invention, such strategic and targeted communications to distinct member segments have not been offered in the health club industry.


IV. Examiner's use of "Official Notice"

In his analysis of the prior art, the examiner makes several inaccurate statements and takes improper "official notice" of important features of the claimed system and method. Specifically, the examiner states, that "it is customary for a health club facility to send an invitation to new users to come and try the club out for free for a limited period of time in an effort to recruit them as new members." Office Action, p. 9 at ¶2. This statement is incorrect. While it may be customary to send such invitations to *prospective users or members* who have not joined the club, these individuals are not members or new users. The "invitation" is incenting the non-member recipient to sign up for a fee-based membership. This type of communication is unrelated to the issue of **retention**. The examiner further states that such invitations serve to "incentivize existing members to continue patronizing the club and so on and so forth." Id. If the examiner is suggesting that such invitations are being sent to existing club members, Applicant submits that this is not being done. Current marketing efforts to *existing members* (with the exception of the invention) are generally intended to sell existing members additional services, such as personal training, massage treatments, supplements, pro shop items, etc., and thereby improve the health club's ancillary revenues (non fee-based membership revenues). These communications are generally mass-mailed, are not attendance-based, do not offer a strategically-defined message to the member, and have essentially no relevance to the issue of retention.

The examiner is kindly requested to cite *specific prior art* which discloses marketing literature or other communications to *existing health club members* which is customized and targeted to *distinct member segments* based on the members' attendance level, and which operates to promote *membership retention*. Applicant respectfully submits that no such prior art exists.

For the reasons discussed above, Applicant submits that all of the claims in the case are now in condition for allowance. Such action is therefore respectfully requested at an early date. If the Examiner believes that issues remain for discussion, he is invited to contact the undersigned at the telephone number indicated below.

Respectfully submitted,



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